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Re: Proposed MCR 3.210(C)(5)

OFFICE OF
THE CHIEF JUSTICE

I urge the adoption of the proposed MCR 3.210(C)(5), with some additions.

As indicated in the proposed court rule, it is important to restrict the use of information from the children's interview to the child's custody preference. This proposed rule upholds the constitutional due process requirements by carefully restricting the scope of non-record "evidence" to that information strictly necessary to determine best interest factor (i), while minimizing stress on children.

However, making a (sealed) record of the interview should be mandatory, not discretionary with the finder-of-fact. Absent a record, the appellate courts cannot carry on their review function of, *inter alia*, determining that the *in camera* interview remained narrow in focus. See Foskett v Foskett, 247 Mich App 1, 9-10, 634 NW2d 363 (2001), in which the court of appeals was unable to determine from the record, and had to divine, how the trial court reached its conclusion.

Whether the attorneys should be able to review the transcript during an appeal similarly requires balancing the desire to shield children from the potential trauma of revealing their preferences against important due process requirements which preserve our "jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson v McLean Credit Union*, 491 US 164, 172, 109 S Ct 2363, 105 L Ed 2d 132 (1989). Without seeing the transcript, attorneys cannot properly raise and address this issue on appeal, and the appellate courts are not properly aided in performing the review function.

One solution is to redact the transcript that is provided to the attorneys (but not the appellate judges), so as to eliminate only the child's statement of his preference, and then permit the attorneys to use the redacted transcript on appeal. If this were done, the child's preference would remain private and sealed, while any other information in the interview is properly subjected to appellate review. The person doing the redacting should be someone other than the trier of fact, thus preventing even any appearance of impropriety.

Judith A. Curtis (P31978)